ALEXANDER L. STEV
CLERK

No. 80-1301

In the Supreme Court of the United States

OCTOBER TERM, 1980

JOSEPH A. RUSS, et al.,
Petitioners,

vs.

RICHARD E. WILKINS, et al.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Brief of the Respondents

GEORGE DEUKMEJIAN
Attorney General of the
State of California

R. H. CONNETT
Assistant Attorney General

RODERICK WALSTON
Deputy Attorney General

CHARLES W. GETZ IV
Deputy Attorney General

6000 State Building
San Francisco, CA 94102
Tel: (415) 557-3920
Attorneys for Respondents

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

QUESTION PRESENTED

The question presented is whether the boundaries of the Round Valley Indian Reservation as described in the Act of March 3, 1873, 17 Stat. 633, were reduced by Congress pursuant to the provisions of the Act of October 1, 1890, 26 Stat. 658.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Authorities	iii
Statement of the Case	1
Summary of Argument	2
Argument	3
I. The Court of Appeals' Decision Properly Analyzes Congress' Intent in Enacting the 1890 Act, and This Court Should Not Review This Case for the Purpose of Further Examining This Question	3
II. This Court May Wish to Review This Case for the Purpose of Clarifying Its Past Decisions in Reservation Boundary Cases	8
Conclusion	14

TABLE OF AUTHORITIES

Cases

Pages

DeCoteau v. District Court, 420 U.S. 425 (1975) 3, 6, 7, 9, 10, 11, 13

Mattz v. Arnett, 412 U.S. 481 (1973) 3, 7, 8, 9, 10, 11, 12, 13

Puyallup Tribe of Indians v. Department of Game, 433 U.S. 165 (1977) 11

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) 3, 9, 10, 11, 12, 13

Seymour v. Superintendent, 368 U.S. 351 (1962) 3, 6

United States v. Washington, 496 F.2d 620, cert. denied, 419 U.S. 1032 (1974)..... 11

United States Statutes

Act of 1905, 33 Stat. 706 9
Act of March 3, 1873, 17 Stat. 633 .....1, 2, 5
Act of October 1, 1890, 26 Stat. 653, 658 .....1, 2, 3, 5, 6, 7, 8
General Allotment Act of 1877, 24 Stat. 388 .....4, 9, 12

Congressional

Committee on Indian Affairs, Rpt. No. 1522, U.S. Sen., 4th Cong., 2d Sess. (Ser. 2274, Feb. 27, 1885)..... 4, 7

Miscellaneous

Cohen, *Handbook of Indian Law,* (U.S. Govt. Printing Off., 1942) 12, 13

No. 80-1301

In the Supreme Court of the United States

OCTOBER TERM, 1980

JOSEPH A. RUSS, et al.,
Petitioners,

vs.

RICHARD E. WILKINS, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of the Respondents

STATEMENT OF THE CASE

In 1973, respondent Wilkins, a fish and game warden of the California Department of Fish and Game, apprehended petitioners Russ and Whipple for violation of California fish and game laws, by killing a deer out of season. Petitioners are enrolled members of the Covelo Indian Community of the Round Valley Indian Reservation in Mendocino County, California. It was stipulated at trial that the deer, which was in petitioners' possession at the time of their apprehension, had been killed on lands which had been added to the Indian reservation by the Act of March 3, 1873, 17 Stat. 633. These lands remained a part of the reservation at least until the Act of October 1, 1890, 26 Stat. 658. The question in the case is whether the latter Act terminated the reservation status of the lands in ques-

tion, and thus whether California has jurisdiction to regulate the Indian taking of deer on said lands.

The history of the disputed lands, and the effect of the 1873 and 1890 enactments, is succinctly described in the Court of Appeals' decision, contained in an appendix attached to the petition for writ of certiorari. See Pet. App. 21-23. Rather than describe these matters further, we incorporate the description provided in the Court of Appeals' decision.

In the proceedings below, the petitioners brought an action for declaratory relief against respondents, and the tribe intervened in support of petitioners. The district court held that the disputed lands were still part of the Indian reservation, and thus that California law was not applicable to the taking of the deer. On appeal, the Court of Appeals reversed, holding that the disputed lands lost their reservation status as the result of the 1890 enactment and thus that Cailfornia law applies to the case.

SUMMARY OF ARGUMENT

The Court of Appeals properly concluded that Congress intended to reduce the size of the Round Valley Indian Reservation by enactment of the 1890 Act. Moreover, this question has no significance beyond the facts of this case. Accordingly, this Court should not review the case for the purpose of further examining this question.

The Court may wish to review this case, however, for the limited purpose of clarifying its past decisions in Indian reservation boundary cases. Although the results of such cases are consistent, the analyses provided in the cases are obliquely inconsistent. The Court, in earlier cases, emphasized the *method* by which Congress disposed of surplus reservation lands in determining the reservation

status of such lands. In more recent cases, the Court has emphasized Congress' *intent* in disposing of such surplus lands, by reference to *all* relevant factors and circumstances; the method of disposal of the surplus lands is merely one of various factors which the Court has considered. The Court may wish to use this case as a vehicle for making clear that the latter approach should be followed by federal courts in future cases.

ARGUMENT

I. THE COURT OF APPEALS' DECISION PROPERLY ANALYZES CONGRESS' INTENT IN ENACTING THE 1890 ACT, AND THIS COURT SHOULD NOT REVIEW THIS CASE FOR THE PURPOSE OF FURTHER EXAMINING THIS QUESTION.

This Court has developed a substantial body of law to guide federal courts in determining whether Congress intended to change the existing boundaries of Indian reservations. See *Seymour v. Superintendent,* 368 U.S. 351 (1962); *Mattz v. Arnett,* 412 U.S. 481 (1973); *DeCoteau v. District Court,* 420 U.S. 425 (1975); *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977). As enunciated in *Mattz v. Arnett, supra,* the question requires examination of *all* relevant circumstances, including the "face of the Act," the "surrounding circumstances," and "legislative history." 412 U.S. at 505.

The Court of Appeals' decision properly follows and applies the factors described in *Mattz* and other cases. Pet. App. 24-41. The appellate court examined the language and legislative history of the 1890 Act, and the historical circumstances surrounding its enactment. *Id.* The Court properly concluded that, based on all relevant circumstances, Congress intended to reduce the reservation boundaries by passage of the Act. *Id.*

Certain salient points in Court of Appeals' analysis bear emphasis. Congress established a committee in 1884 to

examine the needs and conditions of various California Indian tribes, including the tribe located on the Round Valley Indian Reservation. The committee was headed by Senator Dawes, the later author of the General Allotment Act of 1877, 24 Stat. 388. The committee, after conducting a lengthy investigation, published a report in 1885 noting that most of the lands of the Round Valley Indian Reservation were occupied by non-Indian settlers, Committee on Indian Affairs. Rpt. No. 1522, U.S. Sen., 48th Cong., 2d Sess., at p. 2 (Ser. 2274, Feb. 27, 1885)[1]. The report also noted that the existing reservation was too large to serve the small group of Indians who resided on the reservation, and thus that the federal government was having difficulty in protecting the legitimate needs of the Indians. *Id.* The report commented:

> "[T]he earliest measure should be taken *to reduce the boundaries of this reservation to the present wants of these Indians.* All that are upon it cannot amount to more than seven or eight hundred men, women and children. A few thousand acres of valley lands, with perhaps a small portion of upland for grazing purposes, is all that can be utilized for their benefit. To these needs *the limits of the reservation should be reduced* . . . . At any rate, it is the duty of the government to take these Indians and their reservation in hand, and *after having reduced the reservation* to

1. The report stated:

"Men without authority and without paying anything to the Government have occupied from 90,000 to 95,000 acres of the 102,000 acres constituting the reservation for the last twelve or thirteen years, [and] the Government has been obliged to pay during that time for the support of the few Indians upon the reservation since the year 1873, the sum of $241,975.93, an average of $20,165 a year. This statement itself is a sufficient commentary upon the folly which has marked the administration of this reservation during this time." *Id.* at p. 3.

> their present wants and prospective development and apportioned to each one all his necessities, require the balance of the reservation to be sold and the money put into the Treasury for the benefit of these or other Indians." *Id.* at pp. 7-8. (Emphasis added.)

The report thus clearly indicated that the reservation was larger than necessary to serve the Indians' needs, and accordingly should be reduced in size.

Acting pursuant to the recommendations in the 1885 congressional report, Congress passed the Act of October 1, 1890, 26 Stat. 658. This Act, in its title, expressly stated that its purpose was "to provide for the *Reduction* of the Round Valley Indian Reservation." 26 Stat. 658. (Emphasis added.) Thus, the Act, consistently with the recommendations in the congressional report, reduced the size of the reservation.

If any doubt remains, it is removed by language in the text of the Act. Section 2 of the Act specifically distinguishes between "the reservation established under" the Act of March 3, 1873, and the "reservation, as hereby established." 26 Stat. 658. At another point, section 2 refers to the "reservation as herein established." *Id.* The language of section 3 also emphasizes the distinction between the 1873 reservation and the reservation established by the 1890 Act, stating that "the remainder of the grazing and timber lands included in the reservation as present existing shall be surveyed" into tracts of 640 acres. *Id.* There would be no need to use the qualifying phrase "at present existing" if the reservation were to retain its original boundaries.

Further, the administrative interpretation of the 1890 Act, and subsequent legislation relating to the Act, confirm that Congress meant to reduce the reservation boundaries

in the 1890 Act. These factors are discussed at length in the Court of Appeals' decision, see Pet. App. 35-41, and need not be repeated here.

The petitioners argue that only a small number of settlers actually occupied the lands which were the subject of the 1890 Act, and thus that the "familiar forces" at work elsewhere were not at work at the Round Valley Indian Reservation. Pet. 7-8. The historical circumstances relating to this reservation, however, show that the *existence* of non-Indian settlements, regardless of their size or multiplicity, created a serious management problem that impeded the Indians' own needs. Thus, the size and multiplicity of the non-Indian settlements are of little relevance in determining whether Congress meant to reduce the size of the reservation.

The petitioners also argue that, since the unsold part of the surplus lands were later added to the reservation, a "checkerboard" situation would be created if the surplus lands which *were* sold are no longer part of the reservation. Pet. 16-17. In fact, however, such "checkerboard" situations are common in the West, where many surplus reservation lands lost their reservation status when they were sold to non-Indian homesteaders. See, *e.g., Seymour v. Superintendent,* 368 U.S. 351, 354 (1962) (non-reservation status of lands formerly comprising northern half of Colville Reservation in Washington). Whether Congress was wise in creating such "checkerboard" situations is not before this Court. As this Court commented in *DeCoteau v. District Court, supra:*

> "A canon of construction [requiring ambiguous federal Indians laws to be construed favorably to Indians] is not a license to disregard clear expressions of tribal and congressional intent. Some might wish they had

spoken differently, but we cannot re-make history." 420 U.S. at 449.

Thus, the relevant statutory indicia show that Congress, in enacting the 1890 Act, meant to achieve an accommodation of competing interests. On the one hand, as noted in the 1885 congressional report, a small number of Indians occupied lands that were larger than necessary to serve the Indians' needs, and that were too large to be effectively administered by the federal government. On the other hand, many of these lands were occupied by non-Indian settlers with claims of dubious legality. The logical solution to the problem was to reduce the size of the reservation, allowing the Indians to retain the lands necessary for their use and ending the reservation status of lands that were surplus to their needs. This is exactly what Congress accomplished in enacting the 1890 Act. The objective of the Act, as described both in the 1885 congressional report and the 1890 Act, was a "reduction" of the "reservation," which indicates that Congress meant to solve the reservation's problems by reducing its size. This accommodation gave the most fertile agricultural lands of the reservation to the Indians. It also created a smaller, more manageable reservation for their needs. Finally, it removed the basis for the confrontation between Indians and the white man which was a main obstacle to the Indians' own welfare. The congressional solution was thus ideally tailored to the problem itself.

From the foregoing, it is clear that the Court of Appeals properly applied the test formulated in *Mattz* and other cases, in holding that Congress meant to reduce the reservation boundaries by the 1890 Act. Moreover, this question, which involves a single statute that applies only to a single Indian reservation in California, raises no significant issue

of federal law that applies to other reservations, or that has significance beyond the limited facts of this case. For these reasons, there is no basis for the Court to review the lower decision to determine whether it properly ascertained the congressional intent relating to the 1890 Act. As we explain below, however, the Court may nonetheless wish to review this case for the limited purpose of clarifying its decisions in *Mattz* and related cases.

II. THIS COURT MAY WISH TO REVIEW THIS CASE FOR THE PURPOSE OF CLARIFYING ITS PAST DECISIONS IN RESERVATION BOUNDARY CASES.

This Court's decisions in reservation boundary cases, although harmonious in their results, are not altogether harmonious in their rationale. The Court may wish to use this case as a vehicle for clarifying the rationale underlying such cases.

In *Mattz v. Arnett,* 412 U.S. 481 (1973), this Court considered the effect of an 1892 congressional Act that, following the provisions of the General Allotment Act of 1877, allotted certain reservation lands to Indians, and provided for the opening, entry and sale of surplus reservation lands to non-Indian homesteaders. As noted above, the Court held that all relevant circumstances must be examined, including the language, legislative history and surrounding circumstances of the Act. The Court held, however, that Congress, in "opening" the surplus lands for non-Indian settlement, did not necessarily mean to alter the reservation status of the lands. Finding no other statutory indicia indicating that Congress meant to alter the status of the lands, the Court concluded that the lands remained a part of the reservation.

In *DeCoteau v. District Court,* 420 U.S. (1975), this Court considered the effect of an 1889 agreement between

the United States and an Indian tribe, subsequently ratified by Congress, under which the tribe agreed to "cede, sell, relinquish, and convey" all unallotted, surplus reservation lands to the United States. The Court held that, under this agreement, the tribe surrendered title to the surplus lands to the United States, and the surplus lands were no longer part of the reservation. The Court distinguished *Mattz* on grounds that Congress, in *DeCoteau,* had expressly "ceded" surplus reservation lands to the United States and, in *Mattz,* had merely "opened" the surplus reservation lands for non-Indian settlement. 420 U.S. at 447-449. The Court thus appeared to focus primarily on the *method* selected by Congress for disposing the surplus lands; a "cession" of the surplus lands ended their reservation status, whereas—in the absence of a clearly-expressed intent to the contrary—an "opening" of surplus lands did not.

More recently, in *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977), the Court appeared to depart from the "method" approach in determining whether surplus lands retain their reservation status, and instead focused on the "intent" approach. In *Rosebud,* the United States and an Indian tribe conducted negotiations that resulted in an agreement in 1901 for the "cession" of surplus reservation lands to the United States, in return for which the United States promised to pay the tribe for the lands. Congress failed to ratify the agreement, however, because it did not want to obligate the federal government to expend funds for this purpose. Instead, it passed an Act in 1905 that "opened" the surplus reservation lands for settlement by non-Indian homesteaders, and further provided that the non-Indian settlers were to pay for the acquired lands.

The 1905 Act, although "opening" the surplus reservation lands for non-Indian settlement, incorporated the lan-

guage of the 1901 agreement that "ceded" the lands to the United States. 430 U.S. at 596. The Act did not actually result in a "cession" of the lands, however, because the agreement was never approved both by the United States and the tribe; the United States had refused to ratify the original agreement that obligated the federal government to pay for the lands, and the tribe had refused to ratify the amended agreement that obligated the non-Indian settlers to pay for the lands. *Id.* at 597. Hence, although the Act employed the "cession" terminology, it effectively resulted in an "opening" of surplus lands for non-Indian settlement.

Notwithstanding, this Court held that Congress, by employing the "cession" terminology, evinced an intent to terminate the reservation status of the surplus lands. It was inconsequential, the Court ruled, that the lands had not been actually ceded to the United States. Justice Marshall, in a dissenting opinion joined by two other justices, argued that since the surplus lands were actually disposed of by the same method as in *Mattz*, the result should be the same. *Id.* at 615. That is, since the surplus lands in both cases had been "opened" for non-Indian settlement, the surplus lands in both cases retained their reservation status. The majority in *Rosebud*, however, held that, regardless of the method selected by Congress for disposing of the surplus lands, Congress evinced its intent with reasonable clarity to terminate the reservation of such lands.

Mattz, *DeCoteau* and *Rosebud* are harmonious if viewed as establishing the rule that, in determining the reservation status of surplus lands, the courts must ultimately examine all relevant factors relating to the "intent" of Congress, including such factors as legislative history and surrounding historical circumstances. The analysis in *Mattz* and *DeCoteau*, however, appears to examine "intent"

by primary reference to the *method* employed by Congress in disposing of the surplus lands. In *Mattz,* the Court held that the "opening" method does not alter the reservation status of the surplus lands, and in *DeCoteau* the Court held that the "cession" method has the opposite effect. In *Rosebud,* the Court appeared to deemphasize the importance of the method selected by Congress, and instead emphasized the importance of examining *all* relevant circumstances. In light of *Rosebud,* the approach taken in *Mattz*—to the extent that it holds that the "opening" method presumptively has no effect on reservation status—may no longer be valid.[2]

The *Rosebud* approach, in deemphasizing the importance of the method selected by Congress, is consistent with historical circumstances relating to the vagaries of the reservation system. The congressional method of disposing of surplus reservation lands depends on factors unrelated to the needs of the Indians themselves. Specifically, Congress initially disposed of surplus reservation lands by paying the Indians tribes for a "cession" of the lands. See *e.g., DeCoteau v. District Court,* 420 U.S. 425 (1975). This approach, however, proved costly to the federal government, for it obligated the federal government to pay for the lands even though they were not resold to non-Indian settlers. Therefore, commencing with the enactment of the

---

2. This conclusion is also supported by this Court's decision in *Puyallup Tribe of Indians v. Department of Game,* 433 U.S. 165 (1977). The Court, in dictum, stated:

> "The Ninth Circuit, relying on our decision in *Mattz v. Arnett,* 412 U.S. 481, held that the reservation did still exist, *United States v. Washington,* 496 F.2d 620 (1974), cert. denied, 419 U.S. 1032. That decision predates our consideration of *DeCoteau v. District County Court,* 420 U.S. 425, and *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977)." 433 U.S. at 173 n. 11.

The implication of this dictum is that *Mattz* is no longer good law.

General Allotment Act of 1877, Congress established the policy of "opening" surplus reservation lands for entry, settlement and purchase by non-Indian homesteaders. See *e.g., Mattz v. Arnett,* 412 U.S. 481 (1973); Cohen, *Handbook of Indian Law* (U.S. Govt. Printing Off., 1942), 334-336. Under the latter approach, the proceeds of the sales were placed in trust by the United States for the benefit of the Indians. This approach relieved the federal government from the obligation of paying for surplus lands. Instead, the obligation was foisted on non-Indian homesteaders who acquired the surplus lands. In short, Congress changed its method of disposing of surplus reservation lands for fiscal reasons, not for reasons related to the needs of the Indians. Accordingly, it is doubtful whether this congressional change of policy should be a decisive factor in determining whether Congress meant to alter the reservation status of the surplus lands.

For the above reasons, the Court may want to review this case for the purpose of clarifying that, as it held in *Rosebud,* the courts must examine *all* relevant factors relating to the congressional intent, and should not pay undue attention to the method selected by Congress for terminating the reservation lands. As explained above, the Court should not take the case for the purpose of ascertaining the congressional intent, since the Court of Appeals' decision properly resolves this issue. The Court may decide, however, that this case presents an opportunity to make clear that the Court of Appeals' decision, in emphasizing intent rather than method, should be followed by other federal courts in future cases.

The resolution of this question may have critical significance in this case. In this case, Congress chose the "opening" method of disposing of surplus lands, rather

than the "cession" method. Therefore, in this sense, this case is like *Mattz*. On the other hand, all relevant circumstances show that Congress meant to "reduce" the size of the reservation, as explained above. In this sense, this case is like *DeCoteau* and *Rosebud*. Therefore, the resolution of the issues in this case depends on whether the Court truly examines all relevant factors in determining the "intent" of Congress, or instead focuses primarily on the method for the disposal of the surplus lands. The Court of Appeals' decision, in following the former approach, is consistent with this Court's recent decision in *Rosebud*.

CONCLUSION

For the foregoing reasons, it is suggested that the Court should decline to review the case for the purpose of determining whether Congress intended to reduce the size of the reservation, but may wish to review the case for the purpose of clarifying its past decisions in reservation boundary cases.

Respectfully submitted,

GEORGE DEUKMEJIAN
Attorney General of the
State of California
R. H. CONNETT
Assistant Attorney General
RODERICK E. WALSTON
CHARLES W. GETZ IV
Deputy Attorneys General
Attorneys for Respondents